

IN THE HIGH COURT OF GUJARAT
AT AHMEDABAD

Date of decision: 22nd November 1995

CRIMINAL APPEAL NO.535 OF 1989
WITH
CRIMINAL APPEAL NO.591 OF 1989

THE HONOURABLE MR. JUSTICE A.N.DIVECHA

AND

THE HONOURABLE MR. JUSTICE H.R.SHELAT

Shri D.M.Shah, Advocate, for the Appellant in Criminal
Appeal No.535 of 1985 and for the Respondent in Criminal

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Shri S.T.Mehta, Additional Public Prosecutor, for the
Respondent in Criminal Appeal No.535 of 1989 and for the
Appellant in Criminal Appeal No.591 of 1989.

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1. Whether Reporters of Local Papers may
be allowed to see the judgment?
 2. To be referred to the reporter or
not?
 3. Whether their Lordships wish to see
the fair copy of judgment?
 4. Whether this case involved a

substantial question of law as to the
interpretation of the Constitution of
India, 1950 or any order made
thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: A.N.Divecha & H.R.Shelat, JJ.

(22nd November 1995)

Oral Judgment: (Per A.N.Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Sessions Judge of Banaskantha at Palanpur on 18th July 1989 convicting the appellant of Criminal Appeal No.535 of 1989 of the offence punishable under section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and sentencing him to rigorous imprisonment for ten years and fine of Rs.1,00,000 in default rigorous imprisonment for 2 years more is the subject-matter of both these appeals. The original accused has challenged his conviction and sentence. The State has come in appeal for enhancement as the sentence awarded is found to be inadequate. Since both these appeals arise from the very same judgment and order of conviction and sentence and since common questions of law and fact are found arising therein, we have thought it fit to dispose of both these appeals by this common judgment of ours.

2. It is not necessary to set out in detail the facts giving rise to these appeals. It may be sufficient to note that on prior information, the person of the accused - appellant was searched at about 4.30 p.m. on 10th September 1987 by the Circle Police Inspector of Palanpur, named, Shri K.G.Vishen. What was found from the person of the accused - appellant at the relevant time was about 12 kgs. of opium in liquid form. Thereupon, the police officer lodged his complaint. It ultimately came to be registered as Sessions Case No.110 of 1987 in the Sessions Court of Banaskantha at Palanpur. It ultimately culminated into the judgment and order of conviction and sentence as aforesaid. The original accused has invoked the appellate jurisdiction of this court by means of Criminal Appeal No.535 of 1989 for questioning the correctness of his conviction and sentence and the State Government has done so by means of Criminal Appeal No.591 of 1989 for questioning the correctness of the adequacy of the sentence imposed on the accused - appellant.

3. The appeal preferred by the accused - appellant can be disposed of by pressing into service the relevant

provisions contained in section 50 of the NDPS Act. The said provisions are held to be mandatory by the Apex Court in its binding ruling in the case of SAIYAD MOHD. SAIYAD UMAR SAIYAD v. STATE OF GUJARAT reported in 1995 Supreme Court Cases (Cri.) at page 564. It has further been held therein that non-compliance with the aforesaid mandatory statutory provisions would prove fatal to the prosecution case. It has been provided thereunder that, prior to subjecting the person of a suspect to search, an option has to be given to him whether or not he would like to be searched in presence of a Gazetted Officer or a Judicial Magistrate. The material on record of these cases shows that no such option was given to the accused - appellant at the relevant time. In that view of the matter, his conviction and sentence cannot be sustained in law. If the conviction and sentence of the accused - appellant cannot be sustained in law, the question of enhancement of his sentence cannot arise. The appeal preferred by the State Government for enhancement of the sentence imposed on the accused - appellant will have to be disposed of as having become infructuous.

4. In the result, Criminal Appeal No.535 of 1989 is accepted while Criminal Appeal No.591 of 1989 is dismissed. The judgment and order of conviction and sentence passed by the learned Sessions Judge of Banaskantha at Palanpur on 18th July 1989 in Sessions Case No.110 of 1987 is quashed and set aside. We are informed that the accused - appellant is in jail serving his sentence imposed by the learned trial Judge. He is ordered to be set at liberty forthwith if no longer required in any other case. The muddamal is ordered to be disposed of in accordance with the order passed by the learned trial Judge.

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